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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 427

SHERMAN H. SKOLNICK,

Petitioner

vs.

CHARLES T. MARTIN; AND ARTHUR LILLY, AND CHARLES R. PERRIGO,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

The facts are accurately stated by the Court of Appeals 317 F. 2d 855; for the related case see 317 F. 2d 857 which is the subject of Skolnick's other petition for certiorari, No. 397.

On May 23, 1958, Skolnick sued his stockbrokers, including Lilly and Perrigo, in the Circuit Court of Cook County. Skolnick alleged the breach of an alleged oral trust in handling his speculations in the stock market.

On January 7, 1960, defendants took Skolnick's deposition. He was interrogated by defendants' attorney, Martin. This case charging breach of an alleged oral trust was tried January 18 to 26, 1961 and resulted in a hung jury. There has been no retrial. (P. 20.)

On January 4, 1962, two years after the taking of Skolnick's deposition, he filed the present case in the United States District Court against his stockbrokers, Lilly and Perrigo, and their attorney Martin. Skolnick alleges that defendants by means of their agent Martin, caused bodily injuries during the taking of his deposition on January 7, 1960. (Appendix, pp. 3-7 Skolnick Brief in Court of Appeals.)

Skolnick's father, his attorney, and his court reporter were present at his deposition along with defendant's court reporter, defendants Lilly and Perrigo and their attorney, Martin. (Plaintiff's complaint appearing App. p. 5 ¶ 11(e); p. 6 ¶ 11(g) Petitioner's Brief in Court of Appeals.) The deposition was filed in the Circuit Court and used in the subsequent trial on January 18 to 26, 1961.

The present complaint contains no allegation that Skolnick or his attorney ever made any charge in the Circuit Court of Cook County of mistreatment during the taking of the deposition. (App. pp. 3-7 Skolnick Br. in Ct. of App.) Instead, Skolnick waited two years and on January 4, 1962 filed this so-called civil rights case against Lilly, Perrigo and Martin and claimed bodily injury during the deposition on January 7, 1960. On the same day, January 4, 1962, Skolnick filed in the Superior Court of Cook County a similar complaint against the same defendant.

If Skolnick or his attorney had any criticism as to the manner of taking his deposition the remedy was to object on the record and leave the deposition and call the matter to the attention of the presiding judge of the Circuit Court. The rule of the Illinois Supreme Court relating to depositions provides: (Ill. Rev. Stat. 1961 Ch. 110 § 101.19-6(3).)

> "At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in any manner that unreasonably annoys,

> embarrasses, or oppresses the deponent or party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided by these rules;"

The complaint contains no allegation that Skolnick ever complained to the presiding judge as to the manner of the taking of the deposition and sought a protective order pursuant to this rule. (App. pp. 3-7 Skolnick Br. in Ct. of App.) Instead of so doing Skolnick waited two years and filed this so-called civil rights case in the United States District Court.

Skolnick is asking this Court to fashion a rule that any plaintiff in a civil case in a state court whose deposition is being taken can ignore the state procedure governing the conduct of depositions and can wait two years to file a so-called civil rights case in a federal district court and complain that the attorney who interrogated him when taking his deposition forced him to sit in a low back chair, screamed at him, etc., etc., and thereby caused bodily injuries.

The Court of Appeals did not, as Skolnick claims (p. 3), affirm a dismissal for lack of jurisdiction. It affirmed the District Court's dismissal for failure to state a claim upon which relief could be granted (Opinion of Court of Appeals, Petition pp. 30, 34). This is an explicit recognition and exercise of jurisdiction and Skolnick's assertion of a conflict between the decision of the Court of Appeals and the decisions cited by him at pages 23-25 is without basis.

I.

No Cause of Action Is Stated Under 42 U. S. C. § 1983 Because: (a) Defendants Did Not Act Under Color of State Law; and (b) There Was No Deprivation of Any Rights, Privileges or Immunities Secured by the United States Constitution.

Plaintiff relies on 42 U. S. C. § 1983. This statute has no bearing for the following reasons:

First, an attorney taking the plaintiff's deposition in a civil case is not a state functionary acting under color of state law within the meaning of the Federal Civil Rights Acts. *Cooper* v. *Wilson*, 6 Cir. 309 F. 2d 153 (1962); *Swift* v. *Fourth National Bank of Columbus, Georgia*, D. C. M. D. Ga. 205 F. S. 563 (1962).

In *Monroe* v. *Pape*, 365 U. S. 167, relied on by Skolnick, the defendants were Chicago police officers who broke into plaintiff's home, arrested him, took him to the police station, held him on "open charges," interrogated him and refused to take him before a magistrate. These police officers were properly held to be acting under color of state law. Skolnick's complaint does not and cannot allege that a private attorney acts under color of state law when he takes the deposition of a plaintiff in a civil case in a state court. The Court of Appeals' decision is also not in conflict with any of the other cases cited by Skolnick (pp. 26-27).

Second, any right to be free from bodily injury during a deposition in a civil case in a state court is not "the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws. . . ." *Collins* v. *Hardyman*, 341 U. S. 651, 660-2; *Snowden* v. *Hughes*, 321 U. S. 1, 6-7; *Hanna* v. *Home Insurance Company*, 5 Cir. 281 F. 2d 298 (1960), cert. denied, 365 U. S. 838; *Johnson* v. *Stone*, 7 Cir. 268 F. 2d 803 (1959); *Smith* v. *Village of Lansing*, 7 Cir.

241 F. 2d 856 (1957); *Moffatt* v. *Commerce Trust Co.*, 8 Cir. 187 F. 2d 242 (1951), cert. denied, 342 U. S. 818; *Campo* v. *Niemeyer*, 7 Cir. 182 F. 2d 115 (1950); *Baltone* v. *Lindsley*, 10 Cir. 170 F. 2d 705 (1948) cert. denied, 336 U. S. 944."

Monroe v. *Pape*, 365 U. S. 167 in no way supports Skolnick's suit. In *Monroe* v. *Pape* the plaintiff alleged a deprivation of his guarantee against unreasonable searches and seizures contained in the Fourth Amendment and made applicable to the states by the Fourteenth Amendment. Skolnick makes no charge of a deprivation of a right secured by the Constitution. No plaintiff is deprived of a constitutional right when he is allegedly forced to sit "in a low back, narrow, chair," etc. causing alleged bodily injury during the taking of his deposition in a civil case in a state court.

Skolnick's references (p. 16) to "the rack, the thumbscrew and the wheel" shows that he is aware that he must allege a deprivation of a constitutional right. Skolnick cannot assume the pose of a defendant in a criminal case and argue that in violation of the Fifth Amendment he was "compelled in any criminal case to be a witness against himself." Skolnick was simply a plaintiff in a civil case seeking damages, whose deposition was taken. There is no conflict with the cases cited by Skolnick (pp. 28-29).

II.

No Cause of Action Is Stated Under 42 U. S. C. § 1985(2) and (3) Because There Was No Denial of Equal Protection of The Law.

Skolnick also relies on 42 U. S. C. § 1985 (2) and (3). These statutes have no bearing for the following reasons:

There is not even an allegation in Skolnick's complaint that defendants, in violation of § 1985(2) conspired "with

intent to deny to any citizen [Skolnick] the equal protection of the laws, or to injure him or his property *for* lawfully enforcing . . . the right of any person . . . to the equal protection of the laws."

There is no allegation in Skolnick's complaint that defendants, in violation of § 1985(3) "conspired . . . for the purpose of preventing or hindering the constituted authorities of any state . . . from giving or securing to all persons . . . the equal protection of the laws."

In fact Skolnick tried his case before the Circuit Court judge for six days, viz., January 18 to 26, 1961, without ever mentioning the alleged improprieties during the taking of the deposition on January 7, 1960. And, of course, he did not seek a protective order pursuant to Ill. Rev. Stat. 1961 Ch. 110 § 101.19-6 (3). It would be ridiculous to allege (and Skolnick does not allege) that defendants conspired to prevent plaintiff from telling the presiding trial judge of alleged improprieties during the deposition or from filing a motion for a protective order.

Plaintiff's complaint has nothing to do with intent to deny equal protection of the laws, or denial of equal protection of the laws; it simply alleges improprieties during the taking of a deposition. In *Collins* v. *Hardyman* the Court, in construing 42 U. S. C. § 1985, said: (341 U. S. 651, 661-2)

> "The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiments they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one negligibor without assaulting them all, or to libel some persons without mention of others. Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so. Plaintiffs' rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor

"their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws*, and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob."

In order to allege a denial of equal protection of the laws it is necessary to allege an "intentional or purposeful discrimination between persons or classes." *Snowden v. Hughes*, 321 U. S. 1, 7. Here the complaint makes no such allegation.

Despite Skolnick's assertion to the contrary, the decision of the Court of Appeals is not in conflict with any of the cases cited (pp. 27-28).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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